**United States Postal Service *and* Levance McCullough, Jr.** Case 11–CA–11049(P)

September 28, 1990

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On May 1, 1984, the Regional Director for Region 11 of the National labor Relations Board issued a complaint and notice of hearing alleging that the Respondent has engaged in certain unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the National Labor Relations Act. Subsequently, the Respondent filed its answer, admitting in part and denying in part the allegations of the complaint, and raising an affirmative defense. As an affirmative defense, the Respondent contends that Levance McCullough filed a grievance concerning his suspension, that the grievance was resolved at step 2 of the parties' grievance and arbitration procedure, and that the Board should defer to the parties' resolution of the grievance and dismiss the complaint.

Thereafter, on July 10, 1984, the Respondent filed with the Board in Washington, D.C., a Motion for Summary Judgment and a memorandum renewing its contention that the Board should defer to the settlement agreement.

On July 19, 1984, the Board issued an order transferring the proceeding to the Board and Notice to Show Cause why the Respondent's Motion for Summary Judgment should not be granted. On August 10, 1984, the General Counsel filed a response. The General Counsel argues, inter alia, that the Board should not defer to the settlement agreement because the settlement agreement does not address the unfair labor practice charge, and McCullough opposed the settlement agreement from the outset.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on the Motion for Summary Judgment

The facts here are relatively simple and uncontested.[1] Charging Party Levance McCullough served as the Union's shop steward and, prior to the suspension at issue here, he had filed grievances in regard to other discipline that he had received.[2] On September 3, 1983, McCullough asked Supervisor Shamlin for permission to file a grievance. Shamlin gave his approval, but instructed McCullough not to file it until the unloading of a mail truck was completed. Shamlin subsequently noticed that McCullough was not unloading the truck, and, following a search he discovered McCullough completing a grievance form in the presence of Supervisor Ford. Shamlin asked why he was not working, and McCullough replied that Ford had given him permission to file the grievance.[3] Shamlin instructed McCullough to ''clock off'' because he had disobeyed the order to unload the truck before filing the grievance. McCullough replied in a ''very loud and angry'' tone that he and Shamlin had a ''grudge'' to settle, that the matter was a ''personal'' one which should be handled ''off the clock,'' and that he was ''the one to do it.'' Shamlin repeated his order to ''clock off,'' but McCullough stated that he intended to find his alternate steward. McCullough left the facility after Shamlin instructed him for the third time to ''clock off.''

Following an investigation, the Respondent imposed a 14-day suspension on McCullough for refusing to obey Shamlin's order to unload the truck and for making threatening remarks. McCullough then filed a grievance and an unfair labor practice charge that the Regional Director deferred processing in accordance with *Dubo Mfg. Corp.*, 142 NLRB 431 (1963), pending disposition of the grievance.

In this regard, the parties' collective-bargaining agreement provides for a multistep grievance procedure culminating in binding arbitration. At step 1 an employee is required to discuss his grievance with his immediate supervisor. The Union may appeal an adverse decision to step 2, which is a meeting between the steward, or other union representative, and a management official at the facility. The Union may appeal an adverse decision at step 2 to step 3, a meeting between the Union's regional representative and the Respondent's regional director for employee and labor relations. At this step the parties may return the grievance to step 2 if they mutually conclude that relevant facts and contentions were not adequately developed.[4]

[1] Contrary to our dissenting colleague, we view it as entirely proper to find, on the basis of counsel for the General Counsel's failure to state disagreement with the facts as stated in the affidavit submitted by the Respondent in support of its Motion for Summary Judgment, that the General Counsel has essentially consented to summary judgment on the basis of those facts. The General Counsel could have avoided this result without conceding the initial argument concerning lack of consent by simply disputing the affidavit as an alternative ground for opposing summary judgment.

[2] On June 13, 1983, McCullough received a 14-day suspension and filed a grievance that was eventually resolved in arbitration. He filed a grievance after receiving a letter of warning on September 8, 1983, that was resolved when the parties reached a settlement.

[3] Ford had granted permission without knowing that Shamlin had previously instructed McCullough to unload the truck.

[4] The contract provides that the grievant ''shall'' be represented at step 2 ''for all purposes'' by a steward or union representative ''who shall have authority to settle or withdraw the grievance as a result of discussion or compromise. . . .'' The contract also indicates that the management official shall have authority ''to grant or settle the grievance in whole or in part.''

The contract also indicates that at step 3 the union representative ''shall have authority to settle or withdraw the grievance in whole or in part.'' Similarly, the Respondent's representative is authorized ''to grant the grievance in whole or in part.''

In some circumstances the Union may appeal an adverse decision at step 3 directly to arbitration. Issues involving contractual interpretation may be appealed to the national level at step 4 prior to arbitration.

McCullough's grievance was processed to step 3, where the parties' regional representatives mutually agreed to return it to step 2. The Respondent's local representatives subsequently met with McCullough and the Union's local representatives, and the Respondent asked the Union how the matter could be settled. The Union proposed that the suspension be reduced from 14 to 7 days and that McCullough receive 40 hours of backpay at a straight-time rate. McCullough stated that he did not approve the proposal, and the Respondent again asked the Union how the matter could be settled. The Union stated that it considered its offer to be appropriate, and the Respondent accepted. On February 1, 1984, the settlement was reduced to writing and signed by the Union's president and the Respondent's postmaster-manager.[5] The Respondent's counsel advised the Regional Director of the settlement, but the Regional Director subsequently issued a complaint. As noted above, the Respondent thereafter filed a Motion for Summary Judgment, renewing its contention that the Board should defer to the settlement.

We find it appropriate to defer to the settlement agreement in accordance with *Alpha Beta Co*., 273 NLRB 1546 (1985), petition for review denied sub nom. *Mahon v. NLRB*, 808 F.2d 1342 (9th Cir. 1987). In that case, 15 employees filed grievances after being discharged for engaging in a sympathy strike, and the employers and the unions reached a proposed settlement that provided that the employees would be reinstated without backpay. The unions permitted the employees to decide whether to accept the settlement, and the employees voted to authorize the unions to accept it after being fully informed of its terms. Nonetheless, the employees continued to pursue previously filed unfair labor practice charges in order to obtain backpay.

In *Alpha Beta*, the Board announced its intention to apply the deferral principles of *Spielberg*[6] and *Olin*[7] to settlement agreements reached during grievance and arbitration proceedings. The Board found that the application of deferral principles to such settlements would further the policy favoring private resolution of labor disputes. On the facts of the case, the Board concluded that the grievance proceedings were fair and regular, that all parties had agreed to be bound, and that the settlement agreement was not clearly repugnant to the purposes and policies of the Act.

The Ninth Circuit affirmed the Board's *Alpha Beta* decision, finding that the Board had not abused its discretion in developing and applying its standards for deferral.[8] Noting that the Board had cited *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983), for the proposition that a union can waive employees' statutory rights, the court held that ''[w]holly apart from their own separate consents,'' the employees were ''bound by the terms of the settlement agreement'' negotiated by their bargaining representative.[9]

In this case, the first deferral criterion is satisfied because there is no evidence that the grievance proceedings were not fair and regular. The settlement agreement also satisfies the second criterion that all parties have agreed to be bound, even though the circumstances here are different from those in *Alpha Beta*. Although the employees in *Alpha Beta* expressly authorized the unions to accept the settlement, that fact was not necessary to the result, as noted above.[10] Here, McCullough expressed disapproval when the settlement was proposed. But the Union, as his collective-bargaining agent, was, in the words of the Ninth Circuit's affirmance of *Alpha Beta*, empowered to bind him ''wholly apart from [his] own separate consent.'' Further, we find that McCullough authorized the Union to settle the dispute when he invoked the contractual grievance procedure.[11]

We also find that the settlement agreement is not ''clearly repugnant'' to the purposes and policies of the Act. In *Olin*, supra, the Board stated that it would not require that an arbitrator's award be totally consistent with Board precedent. Rather, the Board held that it would not find an award to be ''clearly repugnant''

[5] The settlement as written also provided that McCullough's performance record would be reviewed 1 year after his suspension. The letter of suspension was to be removed from his file if he had received no subsequent discipline within that year.

[6] *Spielberg Mfg. Co*., 112 NLRB 1080 (1955).

[7] *Olin Corp*., 268 NLRB 573 (1984).

[8] *Mahon v. NLRB*, 808 F.2d 1342, 1346 (9th Cir. 1987).

[9] Id. at 1345.

[10] Although the Board in *Alpha Beta* did not expressly note that the union's exclusive authority over the handling of grievances submitted to the contractual grievance procedure by itself met the consent requirement, such a view is not inconsistent with the Board's opinion. The Board did not state that the evidence of individual consents to the settlement was critical to the decision to defer. To the contrary, the Board in *Alpha Beta*, in discussing the relevant deferral principles, specifically noted that the settlement was intended to resolve the parties' contractual dispute and, to that end, the union could, if it felt it was necessary, waive the employees' statutory rights. The dissent observes that the Board has not deferred to a grievance settlement to which a grievant has not individually consented. However, subsequent to *Alpha Beta*, the Board has not interpreted that decision as requiring individual employee consent, nor has it refused to defer in the absence of such consent. Moreover, as noted in the dissent, the Board in *Energy Cooperative*, 290 NLRB 635 (1988), gave effect to a strike settlement despite the fact that an individual charging party sought to litigate his rights, noting with citation to the Ninth Circuit's affirmance of *Alpha Beta* that the union was authorized as the exclusive representative to bargain on behalf of employees and to settle fully all issues in dispute. We therefore disagree with our dissenting colleague that we are making new law in the present case.

[11] We note that McCullough was not unfamiliar with the operation of the grievance and arbitration procedure. As noted above, he served as the Union's shop steward and had invoked the procedure on previous occasions. We emphasize that the contractual provision, McCullough's position as shop steward, and his familiarity with the grievance procedure are all circumstances supporting a finding that the second criterion has been satisfied in this case. We do not imply that these circumstances must be present in all cases in order for an employee to be bound by a grievance settlement reached by his bargaining agent. On the contrary, we agree with the Ninth Circuit's view and would find that even without specific contractual authority or employee consent a union can bind unit employees to the terms of a grievance settlement. Of course, the union's conduct remains subject to the duty of fair representation. See *Metropolitan Edison*, supra, 460 U.S. 706–707 at fn. 11.

unless it is ''palpably wrong.''[12] Here, the fact that McCullough did not receive all the relief to which he may have felt he was entitled does not render the settlement ''palpably wrong.''[13] Indeed, there is no indication that the resolution of the grievance is repugnant to the Act. Rather, the parties reached a compromise that provided McCullough with 40 hours of backpay and reduced his suspension by one-half.

Finally, although not expressly addressed in *Alpha Beta*, we conclude that the last deferral criterion referred to in *Olin* has been met in this case. The Board held in *Olin* that the unfair labor practice issue must have been considered by the arbitrator and this criterion is met when the contractual issue is factually parallel to the unfair labor practice issue, and the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. 268 NLRB at 574. Critically, the Board also held that the party who would have the Board reject deferral bears the burden of showing the *Olin* standards have not been met. When a settlement is reached prior to arbitration, we examine whether the unfair labor practice issue was considered by the parties. This criterion is satisfied when the contractual issue and the unfair labor practice issue are factually parallel, and the parties were generally aware of the facts relevant to resolving the unfair labor practice. Here, the General Counsel has not raised a genuine issue of fact that this criterion has not been met.

Accordingly, we shall defer to the settlement agreement reached by the parties, grant the Respondent's Motion for Summary Judgment, and dismiss the complaint.

## ORDER

The complaint is dismissed.

CHAIRMAN STEPHENS, dissenting.

Without expressly acknowledging the fact, my colleagues have altered Board law in this case. Furthermore, given the nature of the record on which they have made their decision to defer to the settlement at issue here, I fear that this case illustrates the proposition that hard cases make bad law. I would not grant the Respondent's Motion for Summary Judgment. For the following reasons, I would give counsel for the General Counsel the opportunity to state expressly whether she takes issue with any of the facts asserted by the Respondent and, if she does, I would remand the case for a hearing on the merits.

The ''simple and uncontested'' facts on which my colleagues conclude that the solution negotiated by the Union and the Respondent satisfies all the *Spielberg/Olin*[1] requirements are essentially those attested to in an affidavit submitted by the Respondent's director of employee and labor relations for an area that includes the facility at which Charging Party McCullough was suspended for conduct relating to his processing of a grievance. The affiant was not involved in the incident in question, but she states that it was investigated by the Respondent; and she gives a hearsay report concerning what those involved—McCullough and two of the Respondent's supervisors—did and said. Not surprisingly, her account does not place McCullough in a favorable light.

Had an arbitrator or arbitral panel found these ''facts'' to be true and concluded that McCullough was disciplined, not for zealous grievance processing, but rather for insubordination that clearly went beyond the bounds of contractually permissible worktime grievance processing, I would agree that, applying the ''not palpably wrong'' standard by which the Board in *Olin* elaborated on the *Spielberg* ''not clearly repugnant'' test, we could defer to the arbitral award.[2] We do not, however, have an arbitral award, and we do not know what the representatives of the Union and the Respondent ''found'' when they negotiated a deal under which McCullough would be suspended for only 7 days (rather than 14) and would receive some backpay for the period to which the suspension was reduced. Indeed, the General Counsel argues that we have no evidence that the statutory issue was considered at all. We know only that the matter was taken up by the Union and the Respondent in the course of the grievance procedure and that they reached this compromise over the objection of McCullough.[3]

I acknowledge that counsel for the General Counsel has not expressly taken issue with the facts as stated by the Respondent in its Motion for Summary Judgment. Given the basis for her opposition, however, I am not sure this is a deliberate omission. Counsel for the General Counsel relied—correctly, as explained below—on the proposition that, under Board law as it existed when this case was submitted to us, the Board would not defer to a grievance settlement as conclusive of an employee's statutory claim unless the employee had at least initially agreed to the settlement. She may

[12] 268 NLRB at 574.

[13] See, e.g., *Independent Stave Co.*, 287 NLRB 740 (1987), overruling *Clear Haven Nursing Home*, 236 NLRB 853 (1978), on this point.

[1] *Olin Corp.*, 268 NLRB 573 (1984); *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955).

[2] This is assuming, of course, that the arbitrator does not base the decision on reasons that are inconsistent with the protection of concerted activity. Cf. *Cone Mills Corp.*, 298 NLRB No. 70 (May 25, 1990).

[3] I am aware that the Board defers to arbitral awards that do not state their grounds in writing and that are issued by panels that do not include a neutral or ''public'' member. But even in those cases there is at least the pretense of an adjudication by an equally balanced panel before whom a representative of the grievant and a representative of the employer present the case for and against the grievance. *Terminal-Transport Co.*, 185 NLRB 672 fn. 1 (1970); *Denver-Chicago Trucking Co.*, 132 NLRB 1416 (1961). Moreover, the party representatives do not both argue and decide the case. In the present case, representatives of the Union and the Employer just decided to settle McCullough's grievance by splitting the difference, so to speak, and restoring him to 50 percent of the status quo ante.

well have been under the impression that she did not need to contest the facts alleged by the Respondent in order to defeat the Motion for Summary Judgment.

In the precedent which my colleagues apply today, *Alpha Beta Co*., 273 NLRB 1546, 1547 (1985), the Board expressly embraced ''the views of former Member Penello in his dissent in *Roadway Express*, 246 NLRB 174, 177 (1979).'' In that dissent Member Penello had expressed the view that ''the *Spielberg* tests for deferral apply to grievance settlements as well as arbitration awards.'' Id. Member Penello acknowledged, however: ''Applying these tests admittedly is easier where there is a full-blown arbitration award. Thus, where there is a settlement short of arbitration, I would want to take a close look at all the circumstances.'' Id. at 177 fn. 24. Applying the tests in that case, Member Penello would have deferred to a grievance settlement negotiated for the charging party employee by his union with the employee's approval.

Similarly, in applying Member Penello's standard in *Alpha Beta*, supra, the Board deferred to a grievance settlement in which the employees' involvement was as follows (273 NLRB at 1547):

> All parties had agreed to be bound, including the employees. Although the employees were not themselves involved in the settlement negotiations, they were fully informed as to the specific terms of the proposed settlement by the Unions. Indeed, the Unions left the final decision of acceptance or rejection of the proposed settlement up to the employees, who knew that it did not contain any provision for backpay. Instead of rejecting the settlement on that basis, and without expressing any dissatisfaction to the Respondents, the employees authorized the Unions to accept the settlement agreement on their behalf. Thus, the employees were bound by their acts and those of their collective-bargaining representatives.

I fully acknowledge, as my colleagues point out, that the Ninth Circuit panel, in affirming the Board's order in *Alpha Beta*, made it clear that it found the individual consents of the employees unnecessary to deferral to the settlement. It viewed a union's contractual authority to bind employees to grievance settlements without their consents as sufficient to bind them also for purposes of precluding an employee's pursuit of his remedies under the Act for any possible statutory violations implicated in the incident giving rise to the grievance. *Mahon v. NLRB*, 808 F.2d 1342, 1345 (1987). The fact remains, however, that until the present case, the Board has not deferred to a grievance settlement to which the employee-grievant had not individually consented.

I would not follow the lead of the Ninth Circuit on this point. I agree with the Fourth Circuit, in its opinion denying enforcement of the Board's order in *Roadway Express*, that ''the failure of [an employee] to agree to [a] settlement'' is ''a good basis for refusal to defer.'' *Roadway Express, v. NLRB*, 647 F.2d 415, 425 (1981). The court concluded, however, that the Board had erred in failing to defer in that case because the record showed that the terms of the settlement of the discharge grievance had been fully disclosed to the employee, Brown, and that his single request for a change in the terms had been granted before he returned to his job. Id. It was a full 4 months later, when Brown became dissatisfied with the settlement, that he filed charges with the Board. As the court observed, under those circumstances, ''deferring to the settlement . . . effected by the union's representative acting with the full approval of Brown, would not be repugnant to the national labor policy of respecting agreements freely made between *an employee* and employer, where such agreement [has] been effected under the protection of the employee's bargaining agent.'' Id. at 426 (emphasis added).

I do not mean to say that a union's agreement to a settlement with an employer can never be preclusive of individual employees' attempts to seek vindication of their statutory rights with the Board. In *Energy Cooperative*, 290 NLRB 635 (1988), I concurred in the dismissal of unfair labor practice charges on the ground that a strike settlement agreement executed by the union and the employer of the alleged individual discriminatees essentially waived those individuals' rights to file charges with the Board concerning certain matters settled in the agreement. The case involved denial of certain contractual benefits to strikers, but, as I pointed out, the statutory right at issue was the right to strike, a right that had been collectively exercised by the employees in that case in a strike called by the union that had negotiated the strike settlement. 290 NLRB at 636. Moreover, in view of certain quid pro quos in the agreement that benefited all unit employees, it did not appear that letting the settlement stand as the final resolution of the strike-related issues in question would undermine the statutory policy of prohibiting discrimination that discourages the exercise of the Section 7 right to strike. Id. at 639. I stated, however, that ''whether a union, on behalf of particular employees and without their express individual consent, could waive other types of statutory violations in other contexts . . . would have to be carefully examined in future cases.'' Id. at 639.

In my view, McCullough's filing of the grievance over his discharge would effectively waive his right to Board consideration of the merits of an unfair labor practice charge based on it if the grievance process culminated in an arbitration award that met *Spielberg/Olin* standards or if he gave his individual consent to any settlement reached short of arbitration by his union and his employer that also met those

standards. I would not find such a waiver here, where neither of those conditions obtains.

Because my colleagues in the majority are making a change in Board law governing standards for deferral to grievance settlements that now makes the General Counsel's position on the Respondent's statement of the facts determinative of the case at this stage, I would at the least issue a Notice to Show Cause that would give the General Counsel the opportunity to contest the facts stated in the affidavit proffered by the Respondent.[4] If the General Counsel contests the facts, I would remand for a hearing on the merits of the unfair labor practice allegation.

[4] The General Counsel may contest the facts alleged by the Respondent without resort to counteraffidavits. The Board has no counterpart to Rule 56(e) of the Federal Rules of Civil Procedure, which states that a party opposing a properly supported Motion for Summary Judgment ''may not rest upon the mere allegations or denials of [his] pleading.'' This is so because pretrial discovery like that which is customary in Federal court proceedings is not allowed in Board proceedings. Rule 56 of the Federal Rules of Civil Procedure contemplates that Summary Judgment Motions will be ruled on only ''after adequate time for discovery.'' *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). See Board Rules and Regulations, 29 CFR § 102.24(B), 54 Fed.Reg 38515 (1989).